

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1400

B
P/S

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff - Respondent

vs.

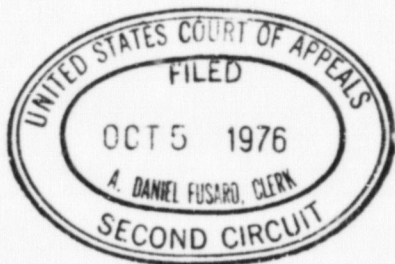
NO. 76-1400

ROBERT L. MONIN

Defendant - Appellant

APPENDIX

CHRISTOPHER J. JONES
Attorney for Defendant-Appellant
Office and Post Office Address
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Buffalo, New York 14201
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PAGINATION AS IN ORIGINAL COPY

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DISTRICT COURT - CRIMINAL DOCKET

JUDGE/Assigned Trial
MAGISTRATE 0906
209 1
District Office

U.S. vs.

MONIN, ROBERT L.

Day Mo. Yr. | Docket No. | Det.
12 11 75 251 1
No. of 1
Defendants

U.S. CODE SECTION
15-1644(a)

OFFENSES

Used fictitious credit cards to obtain
goods affecting interstate commerce
(Ct. 1)

15-1644(e)

Used fictitious credit cards to obtain
airline tickets used for travel in
interstate commerce (Ct. 2)

COUNTS

MAGR. CASE NO.

BAIL & RELEASE

☐ Personal Recog.
Denied ☒ Unsecured Bond
AMT ☐ Conditional Release
Set (000) ☐ 10% Deposit
\$ 2 1/2 ☐ Surety Bond
11/18/75 ☐ Collateral
☐ Bail Not Made
☐ Bail Status Changed
(See Docket) ☐ 3rd Party Custody
☐ PSA

U.S. Attorney or Asst.

Roger Williams

Defense ☒ CJA, ☐ Ret., ☐ Waived, ☐ Self, ☐ None, ☐ Other, ☐ PD, ☐ CD

Christopher Jones

ARREST

11/18/75

or
U.S. Custody
Began on Above
Charges

☐ High Risk
Defn. &
Date Design'd

INDICTMENT

Information ☐

11/12/75

Waived ☐Superseding ☐Indict/Info ☐☐ Prosecution Deferred

ARRAIGNMENT

11/19/75

11/19/75

1st Plea

Final Plea

Trial Set For

☒ Not Guilty☐ Nolo☐ Guilty☐ Not Guilty☐ Nolo☐ Guilty

TRIAL

Voor Dire ☐Trial Began ☐Trial Ended ☐

SENTENCE

Disposition

☐ Convicted☐ Acquitted☐ Dismissed☐ Nolo/Discontinued☐ On All Charges☐ On Lesser Offense☐ WOP: ☐ V.

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed
Summons	Issued			Date Scheduled		<input type="checkbox"/> Held for District GJ
	Served			Date Held		<input type="checkbox"/> Held to Answer to U. S. District Court
Arrest Warrant				<input type="checkbox"/> Waived	<input type="checkbox"/> Intervening Indictment	AT:
COMPLAINT				<input type="checkbox"/> Not Waived		Magistrate's Initials
OFFENSE (In Complaint)				Tape No.	INITIAL/No.	

• Show last names and suffix numbers of other defendants on same indictment/information

V. Excludable Delay

(a) (b) (c) (d)

DATE 11/18/75 PROCEEDINGS Deft. req. assignment of counsel. Arraignment adj'd., pending assignment of counsel.

11/19/75 Filed Appearance Bond.

11/19/75 Filed Cpy 5, CJA 20, Ord. apptg. Christopher Jones counsel, (E. Maxwell, Magistrate).

11/19/75 At arraignment discovery sched. set: motions to be filed by 11/24/75; response by 12/1/75; argument set 12/2/75.

11/24/75 Fld. Deft's mtn. for B/P's, ret. 12/2/75 - Mag.

11/24/75 Fld. Deft's mtn. for Discovery & Inspection, ret. 12/2/75 Mag.

11/25/75 Proceedings before the Magistrate - Motions have been filed; Govt. response 12/1/75 & argument on 12/2/75, as scheduled.

11/28/75 Filed deft's. notice to the U.S. Attorney, at the time of the alleged illegal conduct, the deft. lacked substantial capacity, etc.

12/4/75 Filed deft's notice of motion for order dismissing the Indictment, ret. 12/15/75

12/4/75 Filed Government's Response to Certain pre-trial motions filed by the defendant herein, and Bill of Particulars

12/4/75 Filed Government's Bill of Particulars

DATE 1975	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12/2/75	Proceedings before the Magistrate - Motions have been filed. Govt. response by 12/5/75 and argument is scheduled for 12/9/75 at 10:30 a.m.				
12/9/75	Proceedings before the Magistrate - Argument on discovery, bill of particulars and inspection of grand jury minutes - denied in part or resolved				
12/12/75	Filed Govt's response to Deft's motion to dismiss.				
12/15/75	Adj. with the consent of the court to 1/19/76				
1976					
Jan 26	Adj. with approval of the court to 2/9/76				
Feb. 9	Argument on motion to dismiss, the court directs Govt. to submit offer of proof or minutes of grand jury to the court in camera by 2-23-76				
2/24/76	Filed Govt's pre-Trial Statement				
3/29/76	Filed Deft's notice of motion to suppress evidence				
5/18/76	Filed Deft's notice of motion for an order suppressing various items seized without a warrant and from the possession of the deft., and etc., ret. 5/24/76				
5/24/76	Court directed counsel to draw a jury on 6/22/76				
6/21/76	Filed order denying the deft's motion to dismiss the Indictment. ELFVIN, J.				
6/22/76	Govt. moves case to trial before Judge Elfvin, at Buffalo, N.Y. - Jury is selected but now sworn. Trial adj., Jury and counsel to be notified when to appear.				
6/28/76	Filed subpoena (D.T.) The Great America Gift Catalog, ret. unserved.				
6/28/76	Filed Memorandum and Order that defendant's motions to suppress are hereby denied. Elfvin, J.				
6/22/76	Hearing - Motion to suppress evidence & statements. Argument on motion, decision reserved.				
7/1/76	Filed deft's notice of appeal.				
7/7/76	Filed subpoena DT for American Express Co. served 6/28/76.				
7/6/76	Court accepts plea of guilty by deft. to count one, bail continued, sentencing set for 7-26-76.				
7/12/76	Filed Ct. Steno's transcript of proceedings held on 2/9/76 before Hon. John T. Elfvin.				
7/12/76	Filed Ct. Steno's transcript of proceedings held on 5/22/76 before Judge Elfvin.				
7/12/76	Filed two subpoenas (D.T.) Raylor Gifts, Inc., & Harriet Carter - served 6/24/76, 6/28/76				
7/14/76	Filed copies 2 & 5 CJA 21 order and voucher in the amt. of \$133.50, copy 4 and orig. to Adm. office. ELFVIN, J.				
7/15/76	Copy of notice of appeal and docket entires mailed to CCR.				
		(a)	(b)	(c)	(d)
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

THE UNITED STATES OF AMERICA

-vs-

ROBERT L. MONIN, a/k/a TODD R. MONI

MARCH 1975 SESSION ~~XXXX~~
(Impaneled May 27, 1975)

No.

CB 75-257

Vlo. T. 15, U.S.C.,
§§ 1644(a) and (e)

U.S. District Court

WESTERN DISTRICT OF NEW YORK

COUNT I

The Grand Jury charges:

Beginning on or about the 7th day of November, 1974 and continuing to on or about the 18th day of August, 1975, in the Western District of New York and elsewhere, the defendant, ROBERT L. MONIN, a/k/a TODD R. MONI, did, willfully, knowingly and unlawfully use fictitious credit cards, to wit, American Express Credit Card Numbers 040-072-492-6, 040-072-493-6, 040-073-492-6, 043-496-692-6, 040-073-496-6 and 443-073-492-6 in the name of Todd R. Moni, American Express Card Numbers 040-073-492-6, 443-040-472-6, 040-677-493-4 and 040-073-693-6 in the name of Michael Mattison and American Express Card Number 443-492-326-6 in the name of James M. Mattison, to obtain goods and services aggregating in value in excess of \$1,000.00 and by so obtaining such goods and services engaged in transactions affecting interstate commerce in that the defendant, ROBERT L. MONIN, a/k/a TODD R. MONI, caused to be transported in interstate commerce certain goods and services from the State of Pennsylvania, the State of Iowa, the State of Florida and Ontario, Canada to the City of Buffalo, in the State and Western District of New York; all in violation of Title 15, United States Code, Section 1644(a).

COUNT II

The Grand Jury further charges:

Beginning on or about the 17th day of November, 1974 and continuing to on or about the 26th day of July, 1975, in the Western District of New York, the defendant, ROBERT L. MONIN, a/k/a TODD R. MONI, did, willfully, knowingly and unlawfully use fictitious credit cards, to wit, American Express Credit Card Numbers 040-072-492-6 and 040-072-493-6 in the name of Todd R. Moni, American Express Credit Card Numbers 040-073-492-6, 443-040-472-6, 040-677-493-4 and 040-073-693-6 in the name of Michael Mattison and American Express Credit Card Number 443-492-326-6 in the name of James M. Mattison to obtain airline tickets aggregating in value in excess of \$500.00, which tickets the defendant purchased from Allegheny Airlines, Inc., Pittsburgh, Pennsylvania and which tickets the defendant used to fly to the States of Missouri, Georgia and Florida and the Country of Canada; all in violation of Title 15, United States Code, Section 1644(e).

RICHARD J. ARCARA
United States Attorney

A TRUE BILL:

Foreman

BEST COPY AVAILABLE

A-4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

Cr. 75-251

-vs.-

ROBERT L. MONIN, a/k/a
TODD R. MONI,

ORDER

Defendant.

On November 12, 1975, defendant Robert L. Monin was indicted in a two count indictment for violating Title 15, United States Code, Sections 1644(a) and 1644(e). Defendant has moved this Court for an order dismissing the indictment on the ground that the indictment fails to state an offense under 15 U.S.C. Section 1644.

Defendant's motion to dismiss the indictment is grounded primarily upon the argument that the term "fictitious" contained in Title 15 U.S.C. §1644(a) and (e), the sections under which defendant is charged, does not encompass the use of numbers of non-existent credit cards through oral representations over the telephone.

The statute itself does not define "fictitious" nor is there any available legislative history to aid in such a determination. Defendant has made reference in his memorandum in support of the motion to the legislative history of the establishment of a National Commission on Electronic Fund

Transfers which also was part of Public Law 93-495. The defendant urges the Court to consider Congress's reluctance to act as to electronic transfers as having some bearing as to §1644 covering oral representations of a credit card over the telephone. However, as in the case with many Acts of Congress, Public Law 93-495 is a collection of loosely connected parts. The summary heading reads:

"An Act to increase deposit insurance from \$20,000 to \$40,000, to provide full insurance for public unit deposits of \$100,000 per account, to establish a National Commission on Electronic Fund Transfers, and for other purposes."

It is, therefore, impossible for this Court to find any relationship between Title II and Title IV of the Act.

The defendant also points to what apparently is an internal inconsistency in §1644 itself. An offense under §1644(c) is defined as the use of "*** any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudently obtained;" Defendant then asks the question -- How does one sell or transport a non-existent credit card?

Defendant further argues that "*** the fiction to which the term 'fictitious' refers is not to the fiction of the existence of a card, but rather, to a fiction with regard to the existence of a bona fide lender whose credit backs the

use of the card ***". Defendant reaches this conclusion by first urging a narrow definition for the word "counterfeit": "[T]he term 'counterfeit' only includes attempts to parrot or mimick [sic] the real thing." However in currency counterfeiting a more general definition is used. "The two counterfeit bills bear such a likeness or resemblance to genuine currency as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." [Cites omitted] United States v. Johnson, 434 F.2d 827, 829 (9th Cir. 1970). Therefore, defendant's example of a fictitious credit card as a Master Charge Card containing the name of a non-existent bank is inaccurate. It would in fact be a counterfeit credit card.

Nevertheless, the term "fictitious" could still apply to more than one situation. While it could apply to the non-existent credit card, it could apply to the situation where the credit card issuing company also was non-existent, or where the copied credit card was of such poor quality that no one would not recognize it as a fake. See generally, United States v. Smith, 318 F.2d 94 (4th Cir. 1963) (where copy of bills were of such bad quality that they could not pass for real bills).

In construing penal statutes, a Court must be aware that they must be construed strictly, and that any ambiguity

must be resolved in favor of lenity. United States v. Enmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955). "This in no way implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read." Bell, supra, at 83. With this in mind, the various modifying adjectives for the term credit card used in §1644 should not be viewed as a limitation as to the types of unauthorized credit card use but instead as a conscious effort by Congress to include all unauthorized credit card uses. Just as the term "fictitious payee" includes both those who are real persons yet not persons whom the thief intends to have an interest in the check and imaginary persons, see Uniform Commercial Code §3-405(1)(b) and (c), so also the term fictitious credit card can apply to tangible and intangible credit cards. Therefore, defendant's motion to dismiss the indictment on the ground that the term "fictitious" does not apply should be denied.

Defendant urges that an alternate ground for dismissing the indictment is that it fails to allege that the defendant had any fraudulent intent or that the alleged "fictitious credit card" was used as part of a fraudulent scheme. This argument is based upon the heading of §1644 which reads

"Fraudulent Use of Credit Card". The defendant concludes from this that the statute requires fraudulent intent or knowing use to defraud beyond the knowing use of a fictitious credit card. This argument is meritless. There is no theory of law which would give such importance to a section heading. In addition, the knowing use of a fictitious credit card defines what is fraudulent use of a credit card and to require further would be duplicitous.

The third ground for dismissing the indictment is that 15 U.S.C. §1644(e) is constitutionally vague because the offense is defined under that section using the term "value" without any modifier. The previous §1644 prohibited the fraudulent use of a credit card in a transaction to obtain goods or services "having a retail value aggregating \$5,000.00 or more". The 1974 amendment lowered the amount to goods and services having an aggregated value within any one year of \$1,000.00 (§1644(a)) and airline tickets having an aggregated value within any one year of \$500.00 (§1644(e)). This argument is also meritless. The term value is consistently defined in the criminal statutes -- e.g. 18 U.S.C. §641 and 18 U.S.C. §2311. The fact that the complicated system of airline tickets prevents a readily determined market value does not prevent the value from being set through reference to other sources, e.g. "thieves' markets". See generally United States v. Devail, 462 F.2d 137 (5th Cir. 1972).

Therefore, defendant's motion to dismiss the indictment
should be and is hereby denied.

Dated: Buffalo, N.Y.
June 21, 1976

St. John J. Elgin
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

-vs-

ROBERT L. MONIN, a/k/a
TODD R. MONI

AFFIDAVIT

CR. NO. 75-251

ROBERT L. MONIN, being duly sworn, deposes and says:

1. That I am the defendant in the above entitled action.
2. That since about 1971, I have gone by the name of Todd R. Moni; I am known by my friends as Todd Moni and my phone, bills, etc. are all in the name of Todd Moni.
3. I am presently employed in West Seneca for the State of New York working with retarded children as a therapist assistant; I have been there about three and one-half years and when I applied for the job I used the name of Robert Todd Monin, in order that my high school records, etc. could be properly checked.
4. That when I first started receiving tickets from Allegheny Airlines, I fully intended to repay Allegheny for the retail cost of these tickets.
5. That, as time went on, and I kept getting tickets, and the retail cost of these tickets began to exceed my reasonable ability to pay for them, I was not concerned

because I felt that the Airlines themselves shared my lack of concern, as indicated by their eagerness to continue sending me tickets.

6. That during the entire period that I received these tickets from Allegheny Airlines I was unaware of any collection follow-up by Allegheny, including any letters or phone calls.

7. That my attorney, Christopher J. Jones, has indicated to me that the discovery materials that he has examined indicate that Allegheny may have sent me at least one letter and perhaps left at least one phone call on my tape machine.

8. That I was unaware of the contents of the alleged letter, as related to me by my attorney, or of any phone call or message from Allegheny with regard to this matter.

9. That when Mr. Harm and the other postal inspector appeared at my door to question me about this matter, I assumed that the purpose of their visit was to secure from me repayment for the airline tickets that I had received.

10. That I did not realize, at any time, that I was to be the object of a criminal prosecution, or that Mr. Harm's reference to "courts of law" had any applicability to a criminal prosecution.

11. That I was under the impression that the information I was providing to Mr. Harm and the other postal inspector was required to aid them in the collection of the monies that would be due to Allegheny Airlines for the tickets I received and that I willingly cooperated with them on this basis.

12. That I am a high school graduate and that my grades throughout high school were generally average.

13. That prior to my indictment by the grand jury, I had never been arrested or even received so much as a traffic or parking ticket.

14. That any statements which I made orally or written to Mr. Harm or the other postal inspector were made by me for the purpose of giving them assurance of my intent to repay Allegheny to the best of my ability in this matter.

15. That it was my desire to cooperate with the authorities and arrange for repayment to Allegheny Airlines.

16. That at no time was I engaged in any scheme to bilk Allegheny Airlines and I never resold any of the tickets.

17. That with regard to my right to a lawyer, I felt that it was not necessary insofar as I intended to repay Allegheny, and in addition, I felt that it would be a waste of the government's money to appoint one for me.

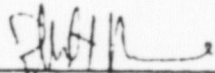
18. That throughout my dealings with Mr. Harm and his associate, it was my desire to cooperate and to settle the whole matter as quickly as possible.

19. That until Mr. Harm made a remark to the effect that I would probably get "probation", at the end of our last interview, I had no idea that I would or could be the object of a criminal prosecution.

20. That throughout my dealings with Mr. Harm and his associate, I had no idea of the possible serious consequences of my statements to the two inspectors.

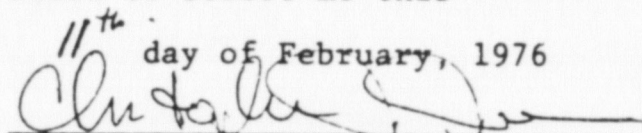
21. Tha. I have had the assistance of my attorney, Christopher J. Jones in drafting this affidavit and that he has advised me that my statements herein are under the penalties of perjury.

22. This affidavit is respectfully submitted to the court in support of my attorney's application for a hearing to determine whether my waiver of rights under the Fourth, Fifth and Sixth Amendments to the Federal Constitution was an intelligent one.



ROBERT L. MONIN

Sworn to before me this

11th day of February, 1976


CHRISTOPHER J. JONES
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

1 Q. You arrived at about 2:10?

2 A. No, approximately 1:50.

3 Q. I'm sorry. And what did you do upon --

4

5 THE COURT: A.m. or p.m.?

6 THE WITNESS: P.m.

7

8 BY MR. WILLIAMS:

9 Q. You then went to the rear apartment?

10 A. Yes, myself and Postal Inspector L. C. Traub. We
11 knocked several times on the door and we heard a voice
12 inside inquiring who we were. I identified myself as
13 being from the Post Office, and we were looking for
14 Todd Moni.

15 Q. All right, sir. Did you hear a response, did someone
16 respond to that?

17 A. Yes. In response, the door was opened.

18 Q. All right, sir. Upon the door being opened, what, if
19 anything, did you do or say?

20 A. I identified myself by showing my credentials to Mr.
21 Moni, told him my name and the fact that I was a Postal
22 Inspector. I also identified Inspector Traub.

23 Q. As whom?

24 A. By name and as a Postal Inspector.

25 Q. All right, sir. Did you ever draw any weapons?

- 1 A. No, sir.
- 2 Q. Did you have weapons?
- 3 A. Yes, I did.
- 4 Q. All right. And you identified yourself and Mr. Traub
5 and what, if anything, happened, what, if anything,
6 did you do or say?
- 7 A. We told Mr. Moni that we were there because of a
8 complaint we had received from Allegheny Airlines, and
9 that we wished to talk to him about it.
- 10 Q. Did he respond to your request?
- 11 A. Yes, he did. He told us to come into his apartment.
- 12 Q. All right, sir. Did you then do that?
- 13 A. Yes, we followed him through the kitchen into the
14 living room.
- 15 Q. All right, sir. And what, if anything, happened in the
16 living room?
- 17 A. As soon as we got in there, I again explained why we
18 were there and I advised Mr. Moni of his Constitutional
19 rights involving self-incrimination.
- 20 Q. Let's take those one at a time. You say you explained
21 to Mr. Moni why you were there; why did you tell him
22 you were there?
- 23 A. That we were investigating a complaint from Allegheny
24 Airlines, investigating the use of the mails in a
25 scheme.

1 Q. How is he dressed?
2 A. He is dressed in a white shirt and has a full beard,
3 curly hair.
4 Q. Did he have a beard back on September 10th?
5 A. Yes, he did.
6 Q. Now, after you read that to him, Mr. Harm, did you say
7 anything to him or did he say anything to you?
8 A. After I read it to him, I handed the form to him and
9 asked him to read it himself, and asked him if he
10 understood it, and he said yes, and I said, "Would you
11 please sign it?" I explained to him that by signing it
12 he doesn't waive any of his rights, it is merely --
13 it signifies that he read it and understood it, he
14 still has the right to stop answering at anytime he
15 chooses.
16 Q. Did he respond to that in any way?
17 A. He signed the form.
18 Q. All right, sir. And it has a time on there of 1:55?
19 A. Yes.
20 Q. About five minutes after you arrived?
21 A. Approximately, yes.
22 Q. And under "Witnessed by" does your name appear?
23 A. Yes.
24 Q. And at the top it has the place and the date?
25 A. The place is 1331 Clinton Street, Apartment 1, Buffalo,

1 A. I would say approximately ten by fifteen feet.

2 Q. All right. Was there furniture in the living room?

3 A. There was an ironing board in the middle of the floor

4 and the entire room was cluttered with papers and

5 envelopes, a pile of coins, and I believe there were

6 a few tables in the room, but nothing substantial.

7 Q. All right, sir. During the period of time that you were

8 talking with Mr. Monin, did you look at any of these

9 papers and things that were laying around?

10 A. Yes, we were able to see everything that was lying on

11 the floor.

12 Q. Can you tell us some of the things that you saw lying

13 on the floor?

14 A. Airline tickets, envelopes with return address of

15 Allegheny Airlines, reserved seat tickets, ticket

16 envelopes such as you would receive when you check in

17 on a boarding date, things of that nature.

18 Q. All right, sir. Did there come a time when you retrieved

19 any of those items?

20 A. Yes, we did. We asked Mr. Monin if he would give us

21 his permission to search his apartment. We told him --

22 Q. Can you tell us, as best you recall, what you said to

23 him?

24 A. As best as I can recall, we told him that we were

25 asking for permission, that he did not have to give us

1 2:30, we told him we did not want to keep him from work,
2 I would like him to come to my office the next day.
3 Q. Did you tell him why?
4 A. Yes, so we could further discuss the problem. I asked
5 him if he would give me a statement at that time and he
6 said he would.
7 Q. All right, sir. What was your purpose in serving him
8 with the grand jury subpoena at that time?
9 A. To insure that he would appear as he had been requested.
10 Q. All right, sir. Did he appear the next day?
11 A. No. He called at approximately 9:00 o'clock in the
12 morning and stated that he was ill and asked if he
13 could come in the following day, September 12th, and I
14 said yes.
15 Q. Did he come to your office on that date?
16 A. Yes, he did.
17 Q. All right, sir. Now, getting back to September 10th,
18 Mr. Harm, how long were you in his presence?
19 A. Approximately thirty-five to forty minutes.
20 Q. All right, sir. Now, have you ever had occasion to
21 observe people under the influence of alcohol?
22 A. Yes.
23 Q. Under the influence of drugs?
24 A. Yes.
25 Q. As a layman, did you have any opinion whether he was

1 were there and then read him that.

2 Q. I see. Did the defendant ask you any questions about
3 any of this?

4 A. No, he didn't.

5 Q. And at the time he signed this, you indicated to him
6 it was not a waiver of his rights, is that correct?

7 A. That is correct.

8 Q. You told him it was not a waiver of his rights?

9 A. I explained to him that he had the right to stop
10 answering at anytime, which it says in the waiver there,
11 but I tell that to the individuals so that they are
12 aware of it.

13 Q. So even though the statement -- in other words, the
14 statement says you also have the right to stop answering
15 at anytime until you talk to a lawyer, when you said
16 that it was because you had read it off the form?

17 A. No, I had read it to him, he had read it, and I said,
18 "Would you please sign it, but remember that you still
19 have the right to stop answering at anytime."

20 Q. In other words, that particular part of the warning you
21 actually repeated?

22 A. Right.

23 Q. Is there any reason that you repeat that particular
24 point?

25 A. No particular reason, other than to make sure that they

1 he asked me if he was under arrest.

2 Q. Was that before or after you gave him the grand jury
3 subpoena?

4 A. I would say after I gave him the subpoena.

5 Q. Do you remember how soon after it was?

6 A. No.

7 Q. Well, do you recall how soon before you left you gave
8 the defendant the grand jury subpoena?

9 A. I would say I gave it to him within a minute or so
10 before we left.

11 Q. But you don't recall exactly when the defendant asked
12 you whether you were going to arrest him?

13 A. I would say he asked that just prior to our leaving
14 his apartment.

15 Q. But you don't know whether it was before or after you
16 gave him the grand jury subpoena?

17 A. No, I really don't.

18 Q. But to -- just to ask my question again, I wasn't sure
19 you gave me a direct answer -- let me ask it this way,
20 other than your reference to the mail fraud statute
21 and the possibility that this situation might be
22 covered by them at the end of your interview, did you
23 at any other time, either on the 10th or 12th, mention
24 the -- use specifically the term "criminal proceedings",
25 use the word "criminal"?

1 A. On the 12th I advised Mr. Monin that I would have to
2 present all the evidence we had to the United States
3 Attorney's office for any action that he deemed warranted.

4 Q. Do you recall at what stage, at what time in your
5 interview on the 12th with Mr. Monin that you did that?

6 A. No, I don't.

7 Q. You don't know whether it was in the beginning or the
8 end?

9 A. It would probably have been near the end.

10 Q. In other words, after the written statement had been
11 given to you?

12 A. Yes.

13 Q. All right. Mr. Harm, looking again at Exhibit 2, could
14 you read that part along the top there?

15 A. United States Postal Inspection Service, warning and
16 waiver of rights.

17 Q. Warning and waiver of rights?

18 A. Yes.

19 Q. Yet you told the defendant that he wasn't waiving his
20 rights?

21 A. I told him that by signing the form he was not waiving
22 his right to stop talking to us, and that is spelled
23 out in the bottom paragraph on the form.

24 Q. However, you chose to repeat that part of the warning?

25 A. Yes.

1 mind, Mr. Harm has explained how he used
2 this, repeating certain parts of it,
3 and the fact it was drafted by the Postal
4 Service as opposed to by a court. In
5 other words, this is what the Postal
6 Service has done with the Miranda warnings.
7 As Mr. Harm indicated, he has what I
8 might call a technique for getting
9 around it or --

10 MR. WILLIAMS: I object to this, counsel is
11 editorializing.

12 MR. JONES: All right. Excuse me, I didn't
13 mean to do so.

14 THE COURT: I will allow you to ask concerning
15 any general patterns of Mr. Harm's
16 utilization of such a form. But other-
17 wise I don't think it has any pertinency
18 in going back into how many times. You
19 can ask if there had been any variation
20 from what he did in this situation
21 from what he did normally.

22
23 BY MR. JONES:

24 Q. All right. Mr. Harm, how long have you been using this
25 form?

1 A. For eight and a half years.

2 Q. As far as you know, has it been changed during that time?

3 A. Not that I can recall, no.

4 Q. All right. And I assume you have had numerous opportu-
5 nities -- numerous occasions to question defendants
6 and deal with this form?

7 A. Yes.

8 Q. Now, with regard to repeating this part about 'you also
9 have the right to stop answering', do you normally do
10 that?

11 A. Yes.

12 Q. Any other parts that you normally repeat?

13 A. On occasion I would just say, 'Remember, you don't have
14 to talk to me and you can stop answering at anytime you
15 want.'

16 Q. Now, Government's Exhibit 5 is a copy of the handwritten
17 statement of the defendant which he gave to you on the
18 12th, is that right?

19 A. Yes.

20 Q. All right. Now, during the time that he was -- did you
21 assist the defendant in drafting this?

22 A. Yes, I did.

23 Q. To what extent did you assist him?

24 A. The first sentence, which is the name and being sworn,
25 et cetera, I dictated to him. The rest of it, I generally

30

1 told him what I would like him to put in the statement,
2 as far as ticket numbers, companies involved, things of
3 that nature.

4
5 THE COURT: You told him by category or did you
6 tell him by specifics?

7 THE WITNESS: By specifics. We went over each
8 individual ticket, I asked him if he
9 knew about this particular ticket, yes,
10 would you put this number, which we both
11 read off the ticket, into the statement.

12
13 BY MR. JONES:

14 Q. These numbers that appear on the bottom of the first
15 page and some on the second page, were numbers that
16 you dictated to the defendant while he was writing, is
17 that correct?

18 A. I dictated them to him after we both examined the
19 tickets.

20 Q. After you examined them, then he wrote them from
21 memory while he was writing?

22 A. No, then we would sit down together, we were sitting
23 together, and he was writing the numbers down.

24 Q. In other words, was the defendant looking at the tickets
25 while he was writing?

1 A. Yes, I do.

2 Q. Now, as of the time that you first saw Mr. Harm, at the
3 time he arrived, had you -- you just indicated you
4 hadn't heard anything from the airline up to that date,
5 you were not conscious of any collection follow-up or
6 effort by the airline to contact you?

7 A. That is correct.

8 Q. Now, will you describe to the Court what happened when
9 Mr. Harm arrived, as best you can recall?

10 A. Everything that Mr. Harm said seems to be -- I seem to
11 remember. He remembers the chronology according to the
12 time better than I do, I don't remember exactly when
13 everything happened. I know I was getting ready to go
14 to work. I was getting out of the shower and he knocked
15 on the door. I guess I was still wet, and I asked who
16 was it. I was used to my neighbors bothering me, and I
17 wasn't going to answer the door unless I knew it was
18 someone other than my neighbors. I know Mr. Harm indicated
19 through the door that he was a Postal Inspector and
20 wanted to see me, I think, and so I opened the door and
21 let them in. They identified themselves and the purpose
22 of their visit and, again, as best as I can remember,
23 they showed me their identification and indicated to me,
24 I believe, why they were there, and I can remember most
25 everything happening in the living room because everything

1 Q. I'm asking what you thought when Mr. Harm was there.
2 A. My thought was to clear the matter up. I wanted to
3 give whatever information was needed, and save the
4 Government the money of wasting a lot of time. I thought
5 Mr. Harm said I didn't indicate I wanted to pay the
6 money back. I thought I indicated to him immediately
7 I wanted to clear the matter up, I will pay what I can,
8 stretch out the payments, whatever. I thought for sure
9 I said that. It seems to me I recall saying that. My
10 intention was not to get into a proceeding like --
11 well, anything like this. When I spoke with him at the
12 post office I didn't think there was -- there would be
13 a trial or anything like that. I just -- I realized --

14 Q. Before this time, had you ever heard what is known as
15 the Miranda warnings on TV, or were you ever familiar
16 with these rights, you have a right to remain silent,
17 anything you say can be used against you in court, you
18 have the right to talk to a lawyer for advice before
19 they ask you any questions, and to have him with you
20 during questioning, if you can't afford a lawyer, one
21 will be appointed for you during questioning, if you
22 wish; were you familiar with those?

23 A. Only in passing reference. I indicated to you that I
24 don't watch TV very much, so I don't see the court
25 proceedings. As far as the Miranda warnings, I didn't

1 know it was called a Miranda warning, but I knew that
2 there was -- that you had to read your rights. I
3 associate it with the police, the right to remain silent,
4 the right to counsel, only in passing. It is nothing
5 that I read up on or nothing I dealt with regularly.

6 Q. All right. At the time that you signed -- well, I show
7 you Government's Exhibit 2. Do you recall signing this
8 in Mr. Harm's presence and Mr. Traub's presence in your
9 apartment? This is Government's Exhibit 2, do you recall
10 signing that?

11 A. As I said, I recall signing quite a few things.

12
13 THE COURT: Is that your signature on there?

14 THE WITNESS: Yes, it is. On specifics, as to
15 what I signed, if you turned them all
16 upside down, I wouldn't know what I
17 signed.

18 BY MR. JONES:

19 Q. When you signed that -- do you remember signing it at
20 all?

21 A. I remember Mr. Harm read me my rights, and I remember
22 him -- it seems to me I can remember him stating to me
23 twice, "You have the right to remain silent, you can
24 stop answering questions at anytime", but like I say,
25 there were so many things I signed, it was a very

50

1 confusing period. I know I signed this, my signature
2 is there, like I know the tickets -- my name was on
3 the tickets, I don't remember specifically going to
4 Kansas City or Vancouver. I know I went, my name was
5 there, I did order those tickets --

6
7 THE COURT: Is there any question at the time
8 that you signed Government's Exhibit 2
9 that you knew what it was that you were
10 signing?

11 THE WITNESS: That I didn't know what?

12 THE COURT: Did you know what you were signing
13 when you signed Government's Exhibit 2?

14 THE WITNESS: I think I understood what that
15 meant, yes.
16

17 BY MR. JONES:

18 Q. What is your understanding of what it meant?

19 A. It meant that -- do you want me to tell what it meant?

20 Q. What was your understanding?

21 A. My understanding was that if I signed this, I would
22 save the Government a lot of hassle by admitting to the
23 things that had been done. We would come to a speedy
24 conclusion on this, and I would repay Allegheny Airlines.

25 Q. Did you anticipate or contemplate at the time that the

1 statement that you were making might be used against
2 you in a criminal proceeding?

3 A. No.

4

5 MR. JONES: That is all I have, your Honor.

6

7 CROSS EXAMINATION BY MR. WILLIAMS:

8 Q. Mr. Moni, I think you have testified you went to school
9 in Kansas City?

10 A. I went to an airlines school in Kansas City, Missouri.

11

12 THE COURT: What school?

13 THE WITNESS: An airlines school, National --

14 I'm sorry, it was Weaver School of
15 Aeronautics. National School is another
16 school.

17

18 BY MR. WILLIAMS:

19 Q. You went to Weaver's School. How long did you attend
20 that school?

21 A. It was a correspondence course by mail, which I took
22 for about seven months. There was one month of in-class
23 study.

24 Q. What was the nature of the studies?

25 A. The nature of the study was to work for the airlines,

1 A. June 8th this year would make four years.

2 Q. Since June of 1972?

3 A. Yes.

4 Q. And what position do you hold there?

5 A. I'm a therapist's assistant. I work with speech and
6 hearing therapy, physical therapy, recreational therapy,
7 as an assistant to their instructions I have programs --

8 Q. Can you just tell us briefly what you do, what you are
9 responsible for?

10 A. I'm responsible for a group of four children and their
11 daily activities from approximately 3:30 in the afternoon
12 to 11:10 or 11:20 at night, and that involves seeing
13 to it that they are clean physically, they have clean
14 clothes, that their personal articles are organized
15 for the next shift so they can carry on from where I
16 left off. I have to see to it that they improve their
17 hand skills, mental skills, speech skills, their inter-
18 action between one another. I try to assist in either
19 improving it or at least keeping it at a steady stage
20 so they don't digress.

21
22 MR. WILLIAMS:

Will you mark this for identifica-
23 tion?

24 (Letter dated April 3, 1975, was
25 marked Government's Exhibit 6 for

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

Cr. 75-251

-vs.-

MEMORANDUM

ROBERT L. MONIN, a/k/a
TODD R. MONI,

and

Defendant.

ORDER

Defendant, having pleaded not guilty to charges in an indictment that he unlawfully used fictitious credit card numbers to obtain goods and services and airline tickets in violation of sections 1644(a) and 1644(e) of Title 15, moved to suppress evidence of certain items of evidence seized in his apartment, of a certain oral statement made to a government agent (Mr. C. M. Harm) at that time and place and of a written statement given to such agent at the latter's office on a subsequent date.

Evidence taken in a hearing showed that the government agent, with another agent, went to defendant's apartment at 1331 Clinton Street in Buffalo, N.Y. on the afternoon of September 10, 1975, that defendant admitted them into his apartment following their self-identification, that Mr. Harm immediately read to defendant the United States Postal Inspection Service's "WARNING AND WAIVER OF RIGHTS" (PS form

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1067 of Oct. 1973), that defendant said that he understood his rights, that Mr. Harm asked defendant to sign the form after advising defendant further that defendant's signature merely would indicate defendant's receipt of the advice and that defendant could stop answering questions anytime he chose to do so, that defendant did sign the form, that defendant thereafter admitted receipt of airline tickets for about the past year pursuant to his using a fictitious credit card number or numbers, that defendant gave the agents permission to search among various papers which were scattered about in defendant's apartment and that a number of airline ticket stubs and appurtenant items were found and seized. Defendant was not placed under arrest.

Two days later, pursuant to arrangement, defendant appeared at Mr. Harm's office and was again read his rights from another copy of the same form and signed his name, indicating he understood. Again, Mr. Harm advised defendant that, even though he had signed the form, he could stop answering questions at any time. Following an interviewing period, defendant's statement was reduced to writing and signed by him. The statement sets forth the following before relating substantive acts:

"I have been advised by Postal Inspector C. M. Harm, Jr. of my constitutional rights. I am aware that I need not make any statement of any kind and that any statement I do make may be used against

me in a court of law. I am also aware that I have a right to have a lawyer present at this interview and that if I am unable to afford one, a lawyer will be appointed to represent me. Knowing all these things, I give this statement of my own free will, without any threats or promises being made to me."

Defendant's argument for suppression is bottomed on the circumstance that the rights form blatantly portrays itself as a waiver and constitutes investigative or prosecutorial overreaching and that defendant was not forewarned of and did not anticipate any resultant criminal proceedings.

The second point is not tenable. While defendant may well have been naive to think that his criminal activities would result only in some action by the duped purveyors' suing him for payment for the goods and services he had received and while there would not be any detriment to investigation and prosecution if the rights form did specify possible use in a criminal case, the agents and the government are entitled to proceed on the fair import of what defendant was told and what he said he understood.

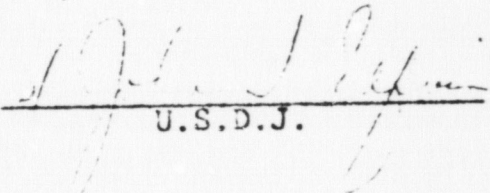
Anent the defendant's first point, whatever might be misleading in the rights form so that one who has signed his name below the statements "I am willing to discuss subjects presented and answer questions. I do not want a lawyer at this time." might feel that from that point forward he had no recourse but to talk, the facts are that such form admittedly was supplemented by the agent's contemporaneous oral advice

to defendant that defendant could stop talking at any time.

The items of physical evidence seized at defendant's apartment were taken pursuant to defendant's consent voluntarily given after knowing his rights.

Defendant's motions to suppress are hereby denied. So ordered.

Dated: Buffalo, N.Y.
June 28, 1976



U.S.D.J.

STATE OF NEW YORK)

SS.:

COUNTY OF ERIE)

3 copies each

BARBARA PAWELA, being duly sworn, deposes and says: deponent is not a party to the action is over 18 years of age and resides at Buffalo, New York. On October 2, 1976, deponent served the within BRIEF FOR APPELLANT and APPENDIX upon THE UNITED STATES ATTORNEY, Attorney for the Plaintiff - Respondent in this action, at 5th Floor, Federal Courthouse Building, Buffalo, New York 14202 by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-a post office- official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Barbara Pawela

Sworn to before me this

2nd day of October, 1976.

Christopher J. Jones

CHRISTOPHER J. JONES
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978